



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB129]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Elkhorn Slough Tidal Marsh Restoration, Phase II in Monterey County, California.

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments on proposed Renewal incidental harassment authorization (IHA).

SUMMARY:

NMFS received a request from the California Department of Fish and Wildlife (CDFW) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to the Elkhorn Slough Tidal Marsh Restoration Project (Phase II) which includes the excavation and movement of soil with heavy machinery for marsh restoration in Monterey County, California. These activities consist of activities that are covered by the current authorization but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.corcoran@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments, including all attachments, must not exceed a 25-megabyte file size. Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Kim Corcoran, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (MMPA) prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow,

upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed incidental take authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical or nearly identical, or nearly identical, activities as described in the Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in

the Detailed Description of Specified Activities section of the initial IHA issuance notice would not be completed by the time the initial IHA expires and a Renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

(1) A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

(2) The request for renewal must include the following:

- An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

(3) Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals. Any comments received on the potential Renewal, along with

relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

The NDAA (Pub. L. 108–136) removed the “small numbers” and “specified geographical region” limitations indicated above and amended the definition of “harassment” as it applies to a “military readiness activity.”

National Environmental Policy Act

The current action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has preliminarily determined that the issuance of the proposed renewal qualifies to be categorically excluded from further NEPA review just as the initial IHA did.

History of Request

On March 13, 2020, NMFS issued an IHA to CDFW to take marine mammals incidental to construction activities associated with the second phase of the tidal marsh restoration project in Elkhorn Slough, California (85 FR 14640; March 13, 2021), effective from June 01, 2020 through May 31, 2021. On May 11, 2021, NMFS received an application for the Renewal of that initial IHA. Although the request was not received 60 days prior to the expiration date of the initial IHA, the applicant has been informed that the Renewal may not be issued until 60 days past the May 11, 2021 submission date.

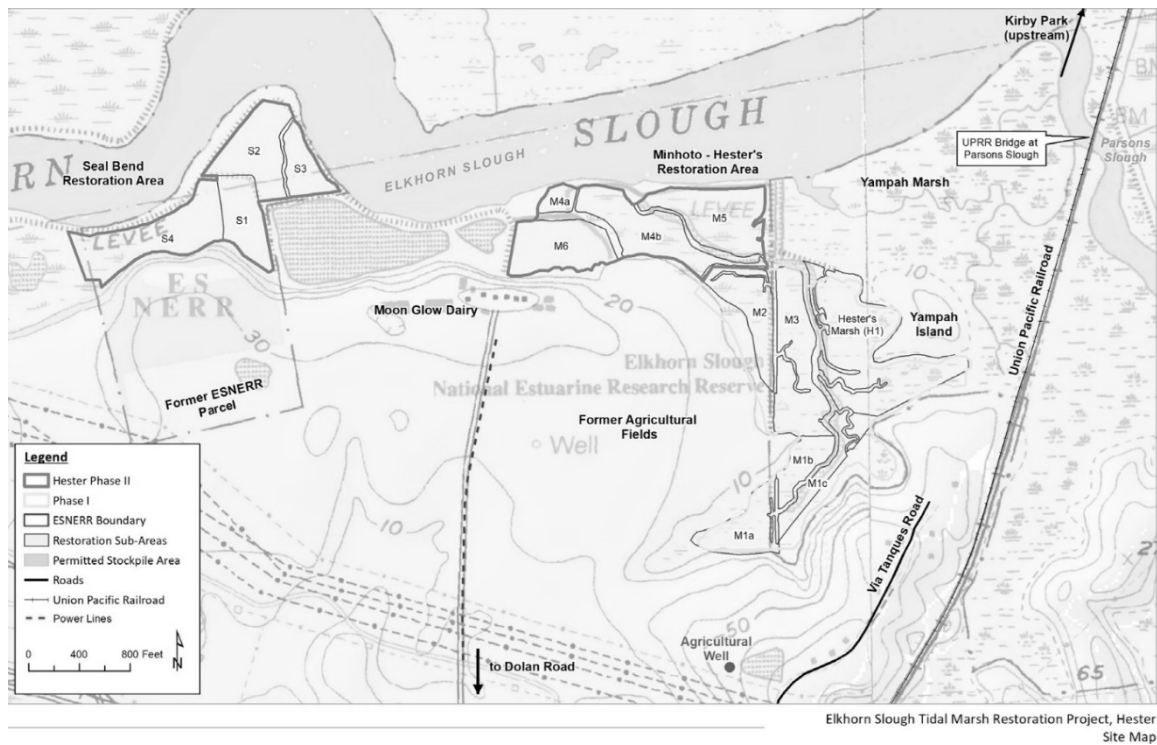
As described in the application for Renewal IHA, the activities for which incidental take is requested consist of activities that are covered by the initial authorization but will not be completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report (available at <https://www.fisheries.noaa.gov/action/incidental-take-authorization-tidal-marsh-restoration-project-elkhorn-slough-phase-ii-2020>) which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. However, NMFS did note that there were a few instances where work continued during the pupping season during what was noted as foggy or hard to see conditions. Despite the low visibility, there were no unexpected changes in behavior noted during the activity. These instances were rare and CDFW has been reminded to shut down activity during times where monitoring cannot be efficiently implemented, especially during pupping season (March – July).

Description of the Specified Activities and Anticipated Impacts

CDFW is unable to complete all of the planned work under the initial 2020 IHA for Phase II of the Elkhorn Slough Tidal Marsh Restoration Project. The initial IHA planned to restore 58 acres of saltmarsh habitat in two areas, Minhoto-Hester Restoration Area (subareas M4a-b, M5, and M6) and the Seal Bend Restoration Area (S1-S4) (Figure 1). To date, the majority of earthwork at the Minhoto-Hester Restoration Area has been completed, including earthwork in subareas M4a-b and M5, however outstanding work in subareas M5 and M6 will not be completed before the May 31, 2021 IHA expiration date. Therefore, CDFW has requested a Renewal IHA to authorize the take of marine mammals for a subset of the initially planned work that has not been completed which will include the outstanding work in subareas M5 and M6. A separate IHA application will be submitted by CDFW for the work at the Seal Bend Restoration Area which has

not been initiated to date, and is expected to start later in the year. Of note, the work in the Minhoto-Hester Restoration Area has taken more days to conduct than initially expected, but the completion of work in that Area is still expected to occur within the total number of workdays contemplated in the initial IHA.

Anticipated impacts would include only Level B harassment of marine mammals (though fewer, since the duration of the proposed activity is shorter). CDFW's request is for one species of pinniped by Level B harassment: harbor seal (*Phoca vitulina richardii*). Monitoring results from the 2020 restoration activities indicate that observed exposures above Level B harassment thresholds were well below the amount authorized in association with the amount of work conducted to date (see monitoring report in renewal request letter). Thus, the subset of Level B harassment take remaining from that authorized under the 2020 IHA will be sufficient to cover the remaining 2021 restoration work at the Minhoto-Hester Restoration Area.



Elkhorn Slough Tidal Marsh Restoration Project, Hester
Site Map

Figure 1 – Overview of Elkhorn Slough Tidal Marsh Restoration Project

Detailed Description of the Activity

As discussed earlier, this is a Renewal to complete the subset of the activity not completed under the initial IHA (85 FR 14640; March 13, 2020). Due to construction delays attributed to severe weather in the winter of 2020 which limited the ability for heavy equipment to access and mobilize onsite in addition to smaller construction crew sizes than anticipated, only 118 days of work occurred between August 2020 and April 2021 of the 180 days anticipated and authorized for this project. The completed work to date includes the majority of earthwork at Minhoto-Hester Restoration Area in subareas M4a-b, and M5. As of the submission of their Renewal request, 62 days of work remains at the Minhoto-Hester Restoration Area which will occur between the time the Renewal is issued and September 2021. The applicant requests authorization for the work remaining as of June 1, 2021 which includes placement of additional fill in subareas M5 and M6 (see Table 1) to raise the subsided marsh plain; excavation of tidal channels in all subareas; and rerouting tidal flow from the existing tidal channel adjacent to Yampah Marsh to the new tidal channel that bisects subareas M4b and M5. All of the remaining work is consistent with work described in the initial IHA. Table 1 (same as Table 1 from application and initial proposed) presents the acreages and extents of proposed fill within each marsh subarea, as well as the volume of fill required for each marsh subarea to be restored. The upland borrow area, onsite, would be used as the fill source. The project would rely primarily on natural vegetation recruitment in the restored marsh areas.

This Renewal request is identical to that of the 2020 IHA, in that it is comprised of a subset of the work that was covered in the initial IHA. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notices. The proposed Renewal would be effective until May 31, 2022 and does not authorize activities related to restoration work in the Seal

Bend Restoration Area as a subsequent IHA application will be submitted by CDFW for such activities at a later date.

The mitigation and monitoring will be identical to that of the 2020 IHA. A detailed description of the restoration activities for which take is proposed may be found in the notices of the proposed (84 FR 72308; December 31, 2019) and the final IHAs (85 FR 14640; March 13, 2020) for the 2020 authorization. All documented associated with the 2020 IHA (*i.e.*, the IHA application, proposed IHA, final IHA, public comments, monitoring reports, etc.) can be found on NMFS's website, <https://www.fisheries.noaa.gov/action/incidental-take-authorization-tidal-marsh-restoration-project-elkhorn-slough-phase-ii-2020>.

Table 1. Volume of fill required in each sub-area in Minhoto-Hester Restoration Area.

Subarea	Area (acres)	Fill Area (acres)	Estimated Fill Volume (CY)
Sub-area M4a	2.5	1.0	46,880
Sub-area M4b	9.7	7.3	44,516
Sub-area M5	10.2	7.8	57,466
Sub-area H6	6.8	5.5	33,792
Total	29.2	21.6	182,654

Source: ESA 2014a

¹ Volumes are mid-range estimates; actual volumes may be higher or lower.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the notices of the proposed and final IHAs for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality

Events, and other scientific literature, and determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the notices of the proposed and final IHAs for the initial authorization. NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the final IHA notice for the initial authorization. Specifically, the activity, days of operation, and marine mammal density data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stock taken, method of take, and type of take remain unchanged from the previously issued IHA. The number of Level B harassment takes will be fewer since the proposed Renewal is for a subset of the days which can be seen in Table 2. The authorized take was determined by multiplying the daily take estimate (37.53) by the number of construction days remaining (62 days) at Minhoto-Hester Restoration Area and rounding up (Table 2).

Table 2. Calculated Take and Percentage of Stock Exposed

Species	Authorized Take		% population ⁴
	Level B	Level A	
Pacific Harbor Seal	417 ¹ max seals/day(9 percent ²)(62 days ³)= 2327	0	1.3%

- | |
|---|
| <ol style="list-style-type: none">1. Maximum number of seals observed/day between January 2018 and April 2019 by Reserve Otter Monitoring Project2. % Take from Phase I3. Number of construction days remaining in Minhoto-Hester Restoration Area4. Data from U.S. Pacific Marine Mammal Stock Assessments: 2015 (Carretta <i>et al.</i>, 2015) |
|---|

All estimates are considered conservative. Construction activities will occur in sections. Noise from construction activities in more southern sections may thus cause fewer disturbances to seals given their distance from seal haul outs (approximately 100 m and greater). There are unlikely to be 417 animals in the project area on any given day. Not all seals that previously used the haul outs within the footprint of the construction are expected use the haul outs just outside the project based on observations from Phase I of the project. Some seals may seek alternative haul out habitat in other parts of Elkhorn Slough.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document and the notice of the proposed IHA (84 FR 72308; December 31, 2019) remains accurate. The following measures are proposed for this renewal:

Timing Restrictions - All work must be conducted during daylight hours when visual monitoring of marine mammals can be implemented. If environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain), construction must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

Visual Monitoring - Required monitoring must be conducted by dedicated, trained, NMFS-approved PSO(s). PSOs shall establish a Level B harassment zone within 300 m of all construction activities. When construction activities occur either, (1) in

water or (2); within the boundaries of the two tidal restoration areas, Minhoto-Hester and Seal Bend identified in Figure 1, monitoring must occur every other day when work is occurring.

When construction activities occur near the “borrow” areas where marsh fill material is gathered, monitoring must occur every fifth day when work is occurring, unless the borrow area is more than 300 m from any area where marine mammals have been observed. Occurrence of marine mammals within the Level B harassment zone must be communicated to the construction lead to prepare for the potential shutdown when required.

Pre-construction clearance and Ramp-up - A 30-minute pre-clearance observation period must occur prior to the start of ramp-up and construction activities. CDFW must adhere to the following pre-clearance and ramp-up requirements: (i) Construction activities must not be initiated if any marine mammal is within 10 m of planned operations. If a marine mammal is observed within 10 m of planned operations during the 30-minute pre-clearance period, ramp-up must not begin until the animal(s) has been observed exiting the zones or until an additional time period has elapsed with no further sightings (15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species), (ii) The construction contractor must begin construction activities gradually each day (*e.g.*, ramp up by moving around the project area and starting equipment sequentially).

Shutdown Requirements - For heavy machinery work, if a marine mammal comes within 10 m of such operations, operations must cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions.

Pupping Season – Construction activities may not be initiated: (1) within 300 m of a mom/pup pair that is hauled out, or (2) within 100 m of a mom/pup pair in the water. If there is a gap in construction activities of more than an hour or if construction moves to

a different area, this initiation protocol must again be implemented. During site containment activities that are underway, heavy machinery must not approach closer than 100 m of where mothers and pups are actively hauled out. If a pup less than one week old (neonate) comes within 20 m of where heavy machinery is working, construction activities in that area must be shutdown or delayed until the pup has left the area. In the event that a pup less than one week old remains within those 20 m, NMFS will be consulted to determine the appropriate course of action.

Activities must cease if a marine mammal species for which take was not authorized, or a species for which authorization was granted but the authorized number of takes have been met, is observed by Protected Species Observers (PSOs) approaching or within the Level B harassment zone. Activities must not resume until the animal is confirmed to have left the area.

Construction Activities - A NMFS approved PSO must conduct biological resources awareness training for construction personnel. The awareness training will be provided to brief construction personnel on identification of marine mammals (including neonates) and the need to avoid and minimize impacts to marine mammals. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work.

Construction activities must not be initiated if any marine mammal is within 10 m of planned operations. If a marine mammal is observed within 10 m of planned operations during the 30-minute pre-clearance period, ramp-up must not begin until the animal(s) has been observed exiting the zones or until an additional time period has elapsed with no further sightings (15 minutes for small odontocetes and pinnipeds and 30 minutes for all other species). Furthermore, the PSO will have the authority to stop project activities if marine mammals approach or enter the Level B Harassment Zone and/or at any time for the safety of any marine mammals. Work will commence only with

approval of the PSO to ensure that no marine mammals are present in the Level B Harassment Zone.

Ramp Up - To reduce the risk of potentially startling marine mammals with a sudden intensive sound, the construction contractor must begin construction activities gradually each day by moving around the project area and starting machinery one at a time.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, NMFS has preliminarily determined that the authorized mitigation measures provide the means effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas).
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors.

- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks.
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat).
- Mitigation and monitoring effectiveness.

PSOs - PSOs shall be used to detect, document, and minimize impacts to marine mammals, as well as, communicate with and instruct relevant construction crew with regard to the presence of marine mammals and mitigation requirements. Independent PSOs (*i.e.*, not construction personnel) who have no other assigned tasks during monitoring periods must be used. Biological monitoring will begin 30 minutes before work begins and will continue until 30 minutes after work is completed each day.

PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals within the Level B harassment zone, defined above. If multiple construction activities occur simultaneously, enough PSOs must be on duty to monitor all Level B Harassment zones.

Qualifications for PSOs for visual monitoring include:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of harbor seals on land or in the water with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target.
- Successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences and a minimum of 30 semester hours or equivalent in the biological sciences and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver must include written

justification. Alternate experience that may be considered includes, but is not limited to (1) secondary education and/or experience comparable to PSO duties; (2) previous work experience conducting academic, commercial, or government-sponsored marine mammal surveys; or (3) previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience).
- Experience or training in the field identification of marine mammals, including the identification of behaviors.
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations.
- Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when construction activities were conducted; dates and times when construction activities were suspended to avoid potential incidental injury from construction sound or visual disturbance of marine mammals observed; and marine mammal behavior.
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(a) PSOs must be provided with the equipment necessary to effectively monitor for marine mammals in order to record species, the distance from species' location to the construction activities, behaviors, and responses to construction activities.

(b) The PSO must also conduct biological resources awareness training for construction personnel. The awareness training will be provided to brief construction personnel on identification of marine mammals (including neonates) and the need to avoid and minimize impacts to marine mammals. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work. Monitoring requirements also include:

Pre-Activity Monitoring - Pre and post construction daily censuses - A census of marine mammals in the project area and the area surrounding the project must be conducted 30 minutes prior to the beginning of construction on monitoring days, and again 30 minutes after the completion of construction activities. The following data will be collected:

- Environmental conditions (weather condition, tidal conditions, visibility, cloud cover, air temperature and wind speed)
- Numbers of each marine mammal species spotted
- Location of each species spotted, including distance from construction activity
- Status (in water or hauled out)
- Behavior

Hourly Counts - Conduct hourly counts of animals hauled out and in the water within, at least, the Level B harassment zone.

Data collected must include:

- Numbers of each species
- Location, including whether inside the Level B harassment zone; whether hauled out or in the water; and distance from construction activities (+/- 10 m)

- Time
- Tidal conditions
- Time construction activities start and end
- Primary construction activities occurring during the past hour
- Any noise or visual disturbance
- Number of mom/pup pairs and neonates observed
- Notable behaviors, including foraging, grooming, resting, aggression, mating activity, and others

Notes should include any of the following information to the extent it is feasible to record:

- Age-class
- Sex
- Unusual activity or signs of stress
- Any other information worth noting

Construction Related Reactions - Record reaction observed in relation to construction activities including:

- Tally of each reaction
- Time of reaction
- Concurrent construction activity
- The assumed cause (whether related to construction activities or not) shall be noted
- Disturbance must be recorded according to NMFS' three-point pinniped disturbance scale (see Table 3)
- Location of animal during initial reaction and distance from the noted disturbance
- Activity before and after disturbance

- Status (in water or hauled out) before and after disturbance

Table 3. Pinniped Behavioral Disturbance Code Reactions

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

Reporting

A draft marine mammal monitoring report would be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. The report must include full documentation of methods, results, and interpretation pertaining to all monitoring. It shall also include marine mammal observations pre-activity, during-activity, and post-activity of construction, and shall also provide descriptions of any behavioral responses by marine mammals due to disturbance from construction activities and a complete description of total take estimate based on the number of marine mammals observed during the course of construction. The report must include an extrapolation of the estimated takes by Level B harassment based on the number of observed disturbances within the Level B harassment zone and the percentage of time the Level B harassment zone was not monitored; *i.e.*, 50 percent of time for the two restoration areas and 80 percent of the time for the borrow and other areas. If comments are received from the NMFS Office of Protected Resources on the draft report, a final report shall be submitted to NMFS within 30 days thereafter following resolution of comments on the draft report from NMFS. If no comments are received from NMFS, the draft report will be considered to be the final report. This report must contain the informational elements described above.

Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (84 FR 72308; December 31, 2019) and solicited public comments on both our proposal to issue the initial IHA for CDFW's activity and on the potential for a Renewal IHA, should certain requirements be met. All public comments were addressed in the notice announcing the issuance of the initial IHA (85 FR 14640; March 13, 2020). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the 2020 IHA.

Comment: The Commission reiterated programmatic recommendations regarding NMFS' potential use of the renewal mechanism for 1 year IHAs; that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated **Federal Register** notice process.

Response: In prior responses to comments about IHA Renewals (e.g., 84 FR 52464; October 02, 2019 and 85 FR 53342, August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

Preliminary Determinations

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or

stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) CDFW activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and; (5) appropriate monitoring and reporting requirements are included.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16. U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity in the Elkhorn Slough Reserve. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to CDFW for conducting Phase II of the Elkhorn Slough Tidal Marsh Restoration Project in Elkhorn Slough located in Monterey County, California, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this notice. Please include with your comments any

supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: June 2, 2021.

Catherine Marzin,

Acting Director, Office of Protected Resources,

National Marine Fisheries Service.

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